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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-368

THE LAW FIRM OF CALIG & WATERMAN, ET AL.,

Petitioners,

vs.

SUPREME COURT OF OHIO, ET AL.,

Respondents.

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Petitioners submit a brief reply, in accordance with the rules of this Court, to address a matter raised for the first time in Respondents' brief in opposition to the petition for certiorari.

IN THEIR BRIEF IN THIS COURT, RESPONDENTS RAISE FOR THE FIRST TIME THE ARGUMENT THAT THE DECISION BELOW RESTED ON STATE GROUNDS. THOSE GROUNDS LACK FAIR AND SUBSTANTIAL SUPPORT AND ARE INADEQUATE TO BAR REVIEW BY THIS COURT.

In this Court, for the first time, Respondents suggest that the Ohio Supreme Court may have dismissed

the complaint below because Petitioners asked for declaratory relief rather than some other form of relief. That position is not supported by any fair reading of Ohio law and was not taken by Respondents below, even though Respondents included the Ohio Supreme Court itself.

The gravamen of the Petition in this case is a claim that the rules of the Ohio Supreme Court restricting lawyer advertising violate the First and Fourteenth Amendments to the United States Constitution; in essence a claim that the Ohio Supreme Court has in certain respects placed arbitrary restraints on free speech. (See points 1 and 2 of the Petition.) The Petition further contends that the Ohio Supreme Court has denied Petitioners' procedural due process by asserting exclusive jurisdiction over Federal constitutional challenges to its own rules and then dismissing substantial challenges to such rules without any hearing as to law or fact and without giving any opinion or reasons for the dismissal.

Respondents' brief, on behalf, inter alia, of the Ohio Supreme Court and its agents, not only confirms but also compounds the due process violation. Respondents herein include the Ohio Supreme Court (which has not asserted, corporately or individually, any claim of immunity) and various of its agents that are responsible for administering the Ohio courts' rules governing the practice of law. In its brief in this Court, for the first time, Respondents assert that the Ohio Supreme Court might have dismissed the complaint because it might lack the authority to grant declaratory relief.

The Respondents' brief thus sets up an objection to certiorari in the nature of a claim that the decision of the Ohio Supreme Court rests on "adequate state grounds." See Murdock v. Memphis, 87 U.S. (20 Wall) 590 (1875). However, Petitioners submit that the argument of the Ohio Supreme Court and its agents, far from

setting forth a valid bar to the review of the underlying constitutional question by this Court, has rather confirmed the fact that Petitioners have been denied due process in the Ohio courts.[1]

This Court has held that in order to bar Federal review of a substantial Federal claim, a state ground must be "adequate" and it must have "fair and substantial" support. Staub v. City of Baxley, 355 U.S. 313, 318-20 (1958); Brinkerhoff-Faris Trust Co. vs. Hill, 281 U.S. 673 (1930); Ward v. County Commissioners, 253 U.S. 17, 22 (1920).

As Mr. Justice Holmes said:

> "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail ... Whether the right was denied or not given due recognition by the state court ... is a question as to which the plaintiffs are entitled to invoke our judgment." Love v. Griffith, 266 U.S. 32, 33-34 (1924) quoted in Henry v. Mississippi, 379 U.S. 443 at 447 (1965).

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[1] Since the Ohio Supreme Court was one of the respondents on whose behalf the opposition brief was filed, one could assume that such a contention represents the position of that court. However, Respondents are careful to phrase their arguments in terms of what "might" have happened. Stembridge v. Georgia, 343 U.S. 541 (1952) relied upon by the Petition does indicate that the doctrine of adequate state grounds has been applied sometimes where the decision might have rested on adequate state grounds. "At this stage, the Supreme Court of Georgia, could have denied certiorari on adequate state grounds." 343 U.S. at 547. (emphasis added) The key word is adequate. If the grounds would have been insufficient to preclude review if made explicit, a fortiori they could not bar review where the fact of their application is only a possibility.

It can hardly be called fair and substantial that a state court admittedly arrogate to itself sole and exclusive jurisdiction over a First Amendment claim and then refuse to exercise that jurisdiction on tenuous grounds, thus completely foreclosing any forum to the complainant. Respondent Ohio Supreme Court admits that its original jurisdiction is founded in the Ohio State Constitution. Article IV, Sec. 2(B)(1), Ohio Constitution, (as set forth in the appendix to Respondents' brief) grants the Ohio Supreme Court original jurisdiction in matters involving "admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Respondent concedes that it claims:

> "exclusive and absolute authority over all matters relating to the practice of law in Ohio." (emphasis added) Respondents' brief, page 3, see also Smith v. Kates, 46 Ohio St. 2d 263 (1976).

(Significantly, Respondents do not suggest in their brief any other court in Ohio that might have jurisdiction over such claims.) The Ohio Revised Code, Section 2721.02 confers on all "courts of record" the power to issue declaratory judgments. The Ohio Supreme Court is unquestionably a court of record. In any event, as Respondents themselves point out, the question of remedy is not jurisdictional. Respondents' brief, page 3. Declaratory judgment would appear to be an appropriate remedy to ask a court to issue when the defendants are itself and its agents who are already subject to its administrative authority. Petitioners, in the standard form, did request that the Ohio Supreme Court "grant such other and further relief as the Court may deem necessary and proper." Complaint, page 5. Thus, if the Ohio Supreme Court had preferred to issue a writ of prohibition or a writ of mandamus, etc., it clearly had

the power to use an alternate remedy. [2] Respondent's contention that its consideration of the substantial Federal constitutional question posed by this case may have been precluded by the request for declaratory judgment (rather than some other remedy) can only be characterized a substantial attempt to erect a procedural bar, lacking in fair support.

That this Court prefers not to mire itself in the intracacies of state procedure is axiomatic and understandable. But it is equally well established that litigants' constitutional rights cannot go by default simply because a state court has invoked a dubious procedural objection to consideration of a substantial First Amendment claim, Staub v. City of Baxley, supra. Neither should this Court decline to consider an important constitutional issue of general interest simply because the case requires reviewing the adequacy of a state court's reasons for refusing to fairly consider a Federal constitutional claim. Henry v. Mississippi, supra.

This case thus involves two pressing constitutional issues: (1) the applicable standard of review in cases involving commercial (professional) free speech and (2) the intractable problem of inadequate state procedural grounds asserted to bar consideration of important Federal constitutional questions.

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[2] See Ohio Rules of Civil Procedure, Rule 54(c) made applicable to original actions in the Ohio Supreme Court, by Ohio Supreme Court Rules of Practice, Rule VIII, Section I. See Raimonde v. VanVlerah, 42 Ohio St. 2d 21 (1975), syllabus 3.

CONCLUSION

It is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

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